FILED
OCT 9 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 493

HARRY SLATKIN BUILDERS, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harry Slatkin Builders, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 14, 1956.

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court of the United States, entered March

31, 1955, is reported in 14 T.C.M. 7. The judgment of the Circuit Court of Appeals is reported in 235 F. (2d) 189 and is printed as Appendix B hereto, *infra*, p. 4a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956, and is set forth in Appendix B hereto, *infra*, p. 4a. Petitioner's petition for rehearing was denied on July 11, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED

Two questions are presented for review:

I. Tax Effect of Liquidation of Real Estate Investment by Piecemeal Sales.

Was the petitioner, by reason of its liquidation of a real estate investment by piecemeal sales, considered as having held such real estate primarily for sale to customers in the ordinary course of its trade or business so as to preclude the gain on such sales from qualifying for the treatment provided by section 117(j) of the Internal Revenue Code of 1939?

II. Scope of Review of Tax Court Decision.

Was a conclusion by the Tax Court, based upon determined facts, that petitioner held certain housing units primarily for sale to customers in the ordinary course of its trade or business within the meaning of section 117(j)(1)(B) of the Internal Revenue Code of 1939, a finding of fact to be reviewed under the limitations of Rule 52(a) of the Federal Rules of Civil Procedure, or was it a conclusion of law?

STATUTES INVOLVED

The statute involved is section 117(j) of the Internal Revenue Code of 1939, which is printed in Appendix A hereto, *infra*, pp. 1a-2a. Substantially the same statutory provision, relating to current taxable years, is provided in section 1231 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

The basis of the jurisdiction of the Court of first instance, the Tax Court of the United States, was a petition filed by the taxpayer, pursuant to section 272 of the Internal Revenue Code of 1939, for a redetermination of deficiencies assessed by the Commissioner of Internal Revenue for the calendar years 1946, 1947, 1948, and 1949.

Petitioner hereby agrees to and adopts the Counter-Statement of Facts submitted to the Sixth Circuit by respondent in its brief in opposition to petitioner's appeal from the Tax Court's decision, with the addendum that petitioner's officer and General Manager, Irvin Hermanoff, testified that the Detroit project was initiated "because I thought it would be a good policy to invest in rental housing" (27a*), that he testified that the decision to file applications toward the end of 1942 for the construction of the duplex houses was "for the purpose of building up an investment portfolio" (37a), and that, when asked if the original purpose was to rent them all, he answered, "That is correct." (40a) This removes any grounds for conflict over facts and removes any possible speculation as to the basis for the Tax Court's decision or its affirmance by the Sixth Circuit. The facts thus agreed to, as stated in respondent's Counter-Statement of Facts, are set

* This and other similar references are to pages of the Appendix to Appellant's Brief in the Sixth Circuit proceedings.

forth in Appendix C hereto, *infra.* pp. 5a-14a. The following is a summary of this statement of the facts:

In 1941 petitioner began the construction of one-family houses for sale. In 1943 petitioner submitted three applications to the War Production Board for the construction of 42 duplex buildings comprising 84 family dwelling units in Detroit, Michigan. Under wartime regulations such units could be disposed of only to war worker occupants, or to eligible war workers if sold within a specified time after completion. Only one-third of the houses could be sold under the second alternative. On October 15, 1945, all Government restrictions on sale of the units were removed.

In its applications to the WPB with respect to the Detroit project, petitioner requested that rental rates be established for the dwelling units and that a sales price be set for 22 of the dwelling units.

Construction of the first 44 units was completed between September 1943 and January 1944. Construction of the remainder was completed between June and December 1944. Prior to completion of the units covered by the first application, petitioner requested, and was granted, permission to rent the 22 units for which a sales price had originally been set.

Application to construct 22 duplex buildings comprising 44 family dwelling units in Dearborn, Michigan, was approved September 7, 1943. All 44 of these units were constructed by petitioner and rented by it, and are still being rented by it.

Of a total of 82 units constructed in the Detroit project, only two were sold in 1944 and three in 1945, and those were sold because of title difficulties and the poor condition of the units themselves.

The Detroit project brought in less than half the net return per unit of the Dearborn project because of a higher tax rate and because the tenants in the Detroit units paid little or no attention to maintenance of the premises and disregarded the efforts of petitioner's caretaker to maintain the properties. Because of this lack of care, petitioner's officers concluded that the Detroit project was deteriorating rapidly and that the net return was even less than that shown by the books. Late in 1945 or early in 1946, petitioner's officers decided to dispose of the properties of the Detroit project, and entered into an oral agreement with a real estate broker to sell the units in the Detroit project. Two "for sale" signs were erected on the project, giving only the name and telephone number of the broker. Of the 77 dwelling units, 73 were sold in 1946, one in 1947, one in 1948, and two in 1949.

Since early 1946 petitioner has initiated a number of projects for the construction of rental units, including the creation of three subsidiaries which have built and rented apartment units costing, in the aggregate, one million dollars. No dwelling units constructed and rented by petitioner or its subsidiaries have ever been sold subsequent to their rental, except those in the Detroit project.

The Commissioner of Internal Revenue determined that petitioner's gain on the disposition of the 77 units in the Detroit project in 1946-1949 was ordinary income, and the Tax Court upheld this determination by finding that during 1946-1949 the units in the Detroit project were held by petitioner primarily for sale to its customers in the ordinary course of its trade or business.

The basis for the Tax Court's decision appears to have been its conclusion that: "The activities of petitioner and of the broker acting on its behalf in disposing of the Detroit units were sufficient to constitute a trade or business." (16a) This conclusion, in turn, appears to have been based upon the following finding:

> "There can be no question but that the sales by the petitioner were frequent, continuous and substantial in 1946, since 73 out of 77 units were disposed of in that year, 59 of them in the first seven months and 71 of the 77 by the broker. Although the sales activities by the petitioner in connection with the disposal of the properties were apparently limited to turning the matter over to a real estate broker and to a reliance upon two roadside signs for advertising purposes, it seems evident that a ready market existed and the absence of a more extensive sales campaign is therefore immaterial. *Nathan D. Goldberg, supra.*" (15a)

As its sole grounds for affirming the decision of the Tax Court, the Sixth Circuit stated, ". . . it appearing that this is a question of fact, . . . And it appearing that the findings of the Tax Court are not clearly erroneous; . . ." The Sixth Circuit thus adopted the conclusions of law of the Tax Court as its own.

REASONS FOR GRANTING THE WRIT

I. ON THE QUESTION OF THE TAX EFFECT OF LIQUIDATION OF REAL ESTATE INVESTMENT BY PIECEMEAL SALES

A. There is a conflict among Circuits

Section 117(j) of the 1939 Code (and section 1231 of the 1954 Code) provide that, if the aggregate of a taxpayer's gains upon sale or exchange or involuntary

conversion of "property used in the trade or business" exceed its losses from such transactions during a taxable year, all such transactions, gain and loss alike, shall be treated as sales or exchanges of capital assets. Conversely, if the losses exceed the gains, none of the gains or losses shall be considered as arising from sales or exchanges of capital assets. For purposes of this provision "property used in the trade or business" means real property and property subject to the allowance for depreciation, if held for more than six months and if not inventory, a copyright or artistic composition under certain specified circumstances, or "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

1. There is a conflict among Circuits as to the meaning of the exclusionary clause under section 117(j)(1)(B): "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business", as applied to piecemeal sales of investments in real estate, including such sales from rental housing projects of the type involved in this case.

The decisions of the Sixth and Ninth Circuits have made the test of "continuity and frequency of sales" virtually the sole criterion in the application of section 117(j)(1)(B) where the liquidation is the result of a voluntary decision of the taxpayer. The result is almost automatically to place the voluntary piecemeal liquidation of any real estate investment of substantial size within the ambit of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business", since prompt liquidation in small units or lots *inevitably* results in meeting the continuity and frequency test which appears to

be controlling in these Circuits. *Homann* v. *Commissioner,* 230 F. (2d) 671 (CA 9th, 1956); *Pacific Homes, Inc.* v. *United States,* 230 F. (2d) 755 (CA 9th, 1956); *Doughterty* v. *Commissioner,* 216 F. (2d) 110 (CA 6th, 1954); *Palo Verdes Corp.* v. *United States,* 201 F. (2d) 256 (CA 9th, 1952); *Rollingwood Corp.* v. *Commissioner,* 190 F. (2d) 263 (CA 9th, 1951).

This was the result in petitioner's case. In affirming the Tax Court's decision in petitioner's case in the manner in which it did (Appendix B, *infra,* p. 4a), the Sixth Circuit has necessarily adopted the conclusions of law of the Tax Court as its own.

The Ninth Circuit has made an exception only in the case of an involuntary disposition. *McGah* v. *Commissioner,* 210 F. (2d) 769 (CA 9th, 1954).

In remanding the case to the Tax Court for additional findings of fact, the Sixth Circuit indicated, in *Winnick* v. *Commissioner,* 199 F. (2d) 374 (CA 6th, 1952), an awareness of certain factors other than continuity and frequency of sales, but the additional factors mentioned would not preclude a conclusion that the housing units were held primarily for sale to customers in the ordinary course of the taxpayer's trade or business by reason of the liquidation of the investment.

In conflict with the foregoing, the Third, Fifth, Seventh, and Eighth Circuits and the Court of Claims have permitted the realization of the value of real estate properties through piecemeal liquidation without the taxpayer being treated as having held such properties primarily for sale to customers in the ordinary course of his trade or business, if the sales activity in connection with this liquidation did not constitute a business. *Curtis Company* v. *Commissioner,* 232 F. (2d) 167 (CA 3rd, 1956); *Goldberg* v. *Commissioner,*

223 F. (2d) 709 (CA 5th, 1955); *Smith* v. *Dunn*, 224 F. (2d) 353 (CA 5th, 1955); *Consolidated Naval Stores Co.* v. *Fahs*, 227 F. (2d) 923 (CA 5th, 1955); *Chandler* v. *United States*, 226 F. (2d) 403 (CA 7th, 1955); *McConkey* v. *United States*, 130 F. Supp. 621 (Ct. Cls., 1955); *Dillon* v. *Commissioner*, 213 F. (2d) 218 (CA 8th, 1954); *Garrett* v. *United States*, 120 F. Supp. 193 (Ct. Cls., 1954); *Delsing* v. *United States*, 186 F. (2d) 59 (CA 5th, 1951); *Fahs* v. *Crawford*, 161 F. (2d) 315 (CA 5th, 1947).

Among the foregoing decisions, *Curtis Company* v. *Commissioner, supra; Goldberg* v. *Commissioner, supra; Dillon* v. *Commissioner, supra,* and *Delsing* v. *United States, supra,* involved the same basic fact situation as does the petitioner's case—i.e., construction of rental housing units under wartime government regulations restricting sales and the subsequent liquidation of the rental housing units with a minimum of sales activity. Among the cited cases from the Sixth and Ninth Circuits, decided adversely to the taxpayer, *Homann* v. *Commissioner, supra; Pacific Homes, Inc.* v. *Commissioner, supra; Dougherty* v. *Commissioner, supra;* and *Rollingwood Corp.* v. *Commissioner, supra,* involved the same basic fact situation as does the petitioner's case.

2. The decision of the Tax Court in petitioner's case, as affirmed by the Sixth Circuit, appears to be based on the petitioner's piecemeal liquidation of the Detroit project. To the extent, however, that the decision, as affirmed, was based on a conclusion that the Detroit project was held from its completion primarily for sale to customers in the ordinary course of petitioner's trade or business, it is in conflict with the Fifth Circuit's interpretation of the meaning of

"primarily". In the Fifth Circuit the question of the meaning of "primarily" in section 117(j)(1)(B) was specifically discussed and decided in *United States* v. *Bennett,* 186 F. (2d) 407 (CA 5th, 1951). Rejecting a contention in that case that "primarily" meant "ultimately", the Court said:

> "If the statute had been intended to mean what the collector contends for, the word 'primarily' would not have been in it. Since 'primarily' is in the statute, it seems clear to us that to hold, as the collector contends, that the main, the first, purpose of the keeping of these breeder cattle was for sale, does complete violence to the statute and to its purpose and intent." (411)

In conflict with the *Bennett* decision, *supra*, the opinion of the Ninth Circuit, in *Rollingwood Corp.* v. *Commissioner, supra,* states that "primarily" means "essential" or "substantial", not "principal" or "chief".

The existence of the conflict among the Circuits on the treatment of piecemeal liquidations of real estate investments was virtually admitted by the respondent in its brief in opposition to petition for certiorari in *Shearer* v. *Smyth,* 221 F. (2d) 478 (CA 9th, 1955), Docket No. 249, October Term, 1955, filed August 17, 1955, cert. den., 350 U.S. 840. This case involved the sale of vacant lots from a subdivision. Respondent's brief in opposition to petition for certiorari in the *Shearer* case stated that section 1237 of the Internal Revenue Code of 1954 provides new and detailed rules on whether gain from sale of lots of subdivisions is to be treated as ordinary income or capital gain and "sharply diminishes the future importance of cases, like the one here, arising under the 1939 Code." (Sec-

tion 1237 of the 1954 Code does not apply to sales of improved real estate, as in the petitioner's case. On this point, see Part I C, *infra.*) Respondent's brief then stated:

> "Accordingly, it has been determined that the Government will not seek certiorari in such recent Fifth Circuit cases as *Smith* v. *Dunn, supra,* (invoked by taxpayers as inconsistent with the instant decision, Pet. 10), and *Goldberg* v. *Commissioner,* decided June 21, 1955 (1955 C.C.H., par. 9519), in which taxpayers prevailed in claiming capital gain treatment on the ground that the real property involved was not held primarily for sale in the ordinary course of a business. The considerations underlying this determination apply equally here and lead us to submit that further review in this case is not warranted."

The existence of the conflict among the Circuits has also been recognized in an opinion by the Fifth Circuit. In *United States* v. *Robinson,* 129 F. (2d) 297 (CCA 5th, 1942), the Court stated:

> "We assume for the purpose of this case that the liquidation of the timber could have been conducted in such fashion and under such facts as that, though appellee had no personal connection with any of the activities, it might be held under the theories of representation and of substantial frequency, regularity, and continuity, advanced in some of the cases and pushed to extreme lengths in the Ninth Circuit, that sales of timber made by her agents, though entirely in liquidation, were sales of 'property held by her primarily for sale to customers in the ordinary course of her trade or business.' " (300)

B. If petitioner's case had been decided by the Third, Fifth, Seventh, or Eighth Circuit, petitioner would have prevailed

1. The scope of review exercised by the Third, Fifth, Seventh, and Eighth Circuits over Tax Court decisions and decisions of District Courts sitting without a Jury in cases like the petitioner's case is so broad as to permit a reversal of the adverse decision of the Tax Court in petitioner's case. This point is discussed in greater detail in Part II hereof. It suffices at this point to note that the Seventh Circuit has specifically decided that the application of section 117(j)(1)(B) to a given fact situation is a conclusion of law, *Three States Lumber Co.* v. *Commissioner,* 158 F. (2d) 61 (CA 7th, 1946); *Chandler* v. *United States, supra;* that the Third Circuit has ruled that its application is an "ultimate fact" not subject to Rule 52(a) of the Federal Rules of Civil Procedure, *Curtis Company* v. *Commissioner, supra,* and that the Fifth Circuit has reached substantially the same conclusion. *Galena Oaks Corp.* v. *Scofield,* 218 F. (2d) 217 (CA 5th, 1954); *Goldberg* v. *Commissioner, supra; Consolidated Naval Stores Co.* v. *Fahs, supra;* and *Smith* v. *Dunn, supra.* The Eighth Circuit has reached the same result, in reversing a Tax Court decision involving the sale of rental housing units constructed during the war under the same basic facts to those in petitioner's case, under the "clearly erroneous" rule. *Dillon* v. *Commissioner, supra.*

The "two-court" rule (*Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271 (1949)) does not apply to this case because the issues involve conclusions of law (see the cases cited in the preceding paragraph), and because petitioner's adoption of respondent's statement of facts (page 3, *supra*), by putting respondent's

case in the most favorable light, resolves any issue of fact which might have been subject to the "two-court" rule.

2. The fact that petitioner's sales of rental housing units from the Detroit project were frequent, continuous, and substantial in 1946, cited in the Tax Court's opinion (15a), would not, under the circumstances of this case, be a factor pointing toward the holding of such units primarily for sale to customers in the ordinary course of the petitioner's trade or business. A piecemeal liquidation of a substantial real estate investment must, by its nature, result in frequent, continuous, and substantial sales, regardless of whether or not the taxpayer is holding the property primarily for sale to customers in the ordinary course of his trade or business. In *Goldberg* v. *Commissioner, supra,* the Fifth Circuit disposed of the test of volume and frequency of sales by pointing out that, "the corporation had a lot of houses to sell." See also *Curtis Company* v. *Commissioner, supra,* and *Ross* v. *Commissioner,* 227 F. (2d) 265 (CA 5th, 1955). The Fifth Circuit has stated that frequency and continuity of sales are not conclusive in themselves. *Lobello* v. *Dunlap,* 210 F. (2d) 465 (CA 5th, 1954); *Fahs* v. *Crawford, supra.*

3. The Tax Court's decision in the petitioner's case contains the following statement (15a):

> "Although the sale activities by the petitioner in connection with the disposal of the properties were apparently limited to turning the matter over to a real estate broker and to a reliance upon two roadside signs for advertising purposes, it seems evident that a ready market existed and the absence of a more extensive sales campaign is therefore immaterial. *Nathan D. Goldberg, supra.*"

The Tax Court opinion subsequently states (16a):

> "The activities of petitioner and of the broker acting on its behalf in disposing of the Detroit units were sufficient to constitute a trade or business."

Taking these two statements in conjunction, it would appear that the Tax Court has gone beyond the decisions holding that property was held primarily for sale in the ordinary course of trade or business by reason of sales activities, by using the *absence* of sales activities to create a presumption of a ready market in which such activities are unnecessary. (*Nathan D. Goldberg,* 22 T.C. 533, cited as authority by the Tax Court, has been reversed by the Fifth Circuit. *Goldberg* v. *Commissioner, supra.*) The Tax Court then appears to have made an additional, implicit assumption that, if there had not been a ready market, the petitioner would have engaged in substantial sales activities, and on the basis of this reasoning it treated the petitioner as though it actually *did* engage in substantial sales activities. This is contrary to the analysis of the term "trade or business" by the Fifth Circuit in *Snell* v. *Commissioner*, 97 F. (2d) 891 (CCA 5th, 1938), in which the Court made the oftenquoted statement that,

> "The word, notwithstanding disguise in spelling and pronunciation, means busyness; it implies that one is kept more or less busy, that the activity is an occupation." (892)

As the Tax Court opinion states, petitioner's only activities were turning the matter over to a real estate broker and reliance upon two roadside signs (which were erected by the broker). Neither of these facts con-

stitute the conduct of a trade or business. Utilization of a broker under contract to sell property for a percentage commission is not a trade or business. *Smith* v. *Dunn, supra; Dunlap* v. *Oldham Lumber Company,* 178 F. (2d) 781 (CA 5th, 1950); *Fahs* v. *Crawford, supra; Dillon* v. *Commissioner, supra; Beck* v. *Commissioner,* 179 F. (2d) 688 (CA 7th, 1950). In *Curtis Company* v. *Commissioner, supra,* the Court stated,

> "It was also conceded that had taxpayer employed a firm of brokers to sell the properties for it the sales then would not be in the ordinary course of the taxpayer's business." (169)

Advertising limited entirely to two roadside "for sale" signs erected by the real estate broker does not constitute a trade or business. *McConkey* v. *United States, supra; Dillon* v. *Commissioner, supra.*

4. Discussing the applicable wartime regulations limiting sale of the rental units built by petitioner in the Detroit project and noting the application filed for permission to sell 22 of the units and the application filed for an increased sales price on certain units, the Tax Court stated that it was not convinced that the housing units which petitioner could have sold to war workers (but did not) "were acquired and held exclusively for investment purposes." (15a) The Tax Court then said that, at the very best, petitioner had "a dual purpose" and that, "In such a situation, it has been held that one of the essential purposes in acquiring or holding the property is the purpose of sale and that the profit on the sale cannot be treated as a capital gain." (16a)

In this discussion, the Tax Court contradicted its own finding of fact that, "Late in 1945 or early in 1946,

petitioner's officers decided to dispose of the properties of the Detroit project . . ." (8a) Also, it contradicted its finding of fact that, "The units sold in 1944 and 1945 were disposed of because of title difficulties and because of the poor condition of the units themselves." (8a) Furthermore, overriding the application for permission to sell some of the housing units is the fact that the houses were not, in fact, sold as a result of such permission. *Delsing* v. *United States, supra.*

The "dual purpose" concept in the Tax Court opinion, quoted above, and the reference to acquisition "exclusively" for investment purposes flatly violate the meaning of "primarily". The Fifth Circuit has specifically held that "primarily" does not mean "ultimately". *United States* v. *Bennett, supra.* (Cf. *Rollingwood Corp.* v. *Commissioner, supra.*)

C. Important questions of Federal law are presented which have not been, but should be, settled by this Court

The large number of cases involving an application of section 117(j)(1)(B) of the 1939 Code which have arisen in the Tax Court and in the District Courts and the large number of appeals from these decisions show (1) that the issue is of widespread importance in the application of the Federal income tax, and (2) that the lower courts have been unable to resolve the legal questions involved in the application of the law in this area without guidance from this Court.* The area of doubt as to the application of the phrase "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" is so broad as to encompass all types of properties used

* Since 1950 at least 135 Tax Court cases, 63 reported District Court cases, and 39 decisions of Courts of Appeals have passed upon this section pertaining to real estate only. In addition, there have been other, unreported District Court cases.

in business—not merely real estate. The fact that the law must be applied to varied fact questions does not suffice to explain either the multitude of cases or the widely divergent results, particularly in cases (like petitioner's) involving the piecemeal liquidation of rental housing projects built under wartime restrictions on sales.

This is a continuing problem under section 1231 of the 1954 Code. While section 1237 of the 1954 Code provides detailed mechanical rules for the handling of a narrow group of cases, the 1954 Code leaves the basic issue unresolved, as before.

Section 1237 does not apply to improved real estate, such as that involved in the numerous conflicting Circuit Court decisions on liquidation of rental housing projects. Even with respect to unimproved real estate, section 1237 of the 1954 Code provides something less than a complete solution. Professor Surrey has stated with reference to the new section 1237 ("Definitional Problems in Capital Gains Taxation", 69 Harv. Law Rev., p. 985, at p. 991):

> "Congress in 1954 added a section covering a page and a half which resolves only to few situations and in doing so manages to create a great many problems. Moreover, the section is essentially limited to unimproved land."

Under these circumstances it is respectfully submitted that this Court has not, but should, provide authoritative rules for the application of section 117 (j)(1)(B) of the 1939 Code and its counterpart, section 1231 (b)(1)(B) of the 1954 Code. Specifically, it is important for taxpayers and the Internal Revenue Service to know whether it is possible to carry out a

piecemeal liquidation of a real estate property (or other type of property) without being treated as holding such property primarily for sale to customers in the ordinary course of trade or business, and whether the word "primarily" means "principal" or "chief", on the one hand, or "essential" or "substantial" or "ultimately", on the other hand.

II. ON THE QUESTION OF WHETHER THE APPLICATION OF SECTION 117(j)(1)(B) OF THE 1939 CODE TO A GIVEN FACT SITUATION IS REVERSIBLE ON APPEAL ONLY IF "CLEARLY ERRONEOUS":

A. There is a conflict among Circuits

In *Three States Lumber Co.* v. *Commissioner, supra,* the Seventh Circuit ruled that the question of whether selling parcels of cut-over timber land constituted the holding of property primarily for sale to customers in the ordinary course of trade or business was a conclusion of law and subject to review as such. In *Curtis Company* v. *Commissioner, supra,* the Third Circuit ruled that the question of whether sales of houses and sales of unimproved land by the taxpayer involved property held "primarily for sale to customers in the ordinary course of his trade or business" was not subject to the "clearly erroneous" provision of Rule 52(a) of the Federal Rules of Civil Procedure. The Fifth Circuit reached substantially the same conclusion in *Galena Oaks Corp.* v. *Scofield, supra*:

> "Insofar, however, as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is 'subject to review free of the restraining impact of the so-called "clearly erroneous" rule.' *Lehmann* v. *Acheson,* 3 Cir., 206 F. (2d) 592, 594. As succinctly stated by Professor Moore, 'Findings

> of fact that are induced by an erroneous view of the law are not binding. Nor are findings that combine both fact and law, when there is error as to the law.' 5 Moore's Federal Practice, 2d ed., Sec. 52.03(3), p. 2631." (219)

The opinion in the *Galena Oaks* case has been quoted with approval and acted upon in subsequent Fifth Circuit decisions. *Goldberg* v. *Commissioner, supra; Consolidated Naval Stores Co.* v. *Fahs, supra; Smith* v. *Dunn, supra.*

The *Three States Lumber Co.* decision was followed in the subsequent Seventh Circuit decision in *Chandler* v. *United States, supra.*

The Sixth, Ninth, and Tenth Circuits have reached the opposite conclusion that the application of section 117(j)(1)(B) is a question of fact. *Shepherd* v. *United States,* 231 F. (2d) 445 (CA 6th, 1956); *Winnick* v. *Commissioner,* 223 F. (2d) 266 (CA 6th, 1955); *Cohn* v. *Commissioner,* 226 F. (2d) 22 (CA 9th, 1955); *Dougherty* v. *Commissioner, supra; Friend* v. *Commissioner,* 198 F. (2d) 285 (CA 10th, 1952); *Rollingwood Corp.* v. *Commissioner, supra; Rubino* v. *Commissioner,* 186 F. (2d) 304 (CA 9th, 1951), cert. den. 342 U.S. 829.

In petitioner's case the Sixth Circuit specifically based its decision on the conclusion that the question was one of fact, citing *Rubino* v. *Commissioner, supra; Dougherty* v. *Commissioner, supra;* and *Shepherd* v. *United States, supra.* (Appendix B, *infra.*) But see *E. H. Sheldon & Co.* v. *Commissioner,* 214 F. (2d) 655, 658, 659 (CA 6th, 1954), in which the Sixth Circuit apparently reached the opposite conclusion.

Although the taxpayer in *Rubino* v. *Commissioner, supra,* petitioned this Court for a writ of certiorari

to the Ninth Circuit (which petition was denied), this point was not raised in the petition (Docket No. 53, October Term, 1950, petition filed May 7, 1951).

B. An important question of Federal law is presented which has not been, but should be, settled by this Court

The importance of such a question is indicated by one of the reasons given by this Court when it granted certiorari in the case of *Dobson* v. *Commissioner*, 320 U.S. 489 (1943): "Questions important to tax administration were involved . . ." The subsequent Act of Congress by which the scope of appellate review of Tax Court decisions was equated with that of District Courts sitting without a jury (section 36, Public Law No. 773, 80th Cong., 2nd Sess., amending section 1141(a) of the Internal Revenue Code of 1939, now section 7482(a) of the 1954 Code) has left unresolved the scope of review of Tax Court (or District Court) decisions applying definitions in the tax statutes to findings of fact—with the resulting conflict noted above.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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